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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC.
AND JOHN A. GRATZIANNA,
Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON,
AND POLICE CHIEF SEYMOUR SAPOZNIK,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF TOWING & RECOVERY ASSOCIATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.3 of the Rules of this Court, and with the accompanying written consents of the parties, Towing & Recovery Association of America, Inc. ("TRAA") submits this brief as amicus curiae in support of petitioners, and urges the Court to reverse the decision of the Seventh Circuit.

THE INTERESTS OF AMICUS CURIAE

TRAA is the national association of companies engaged in the towing and recovery * of motor vehicles.

* As used by the towing and recovery industry, "recovery" operations involve the relocation of a disabled vehicle in order that it

TRAA is a federation of fifty state towing and recovery associations and the towing and recovery association of the District of Columbia. Together with its fifty-one affiliated associations, TRAA currently represents more than 5000 towing and recovery companies nationwide.

Towing and recovery companies play a vital, but nonetheless frequently overlooked, role in facilitating the safe, continuous, and unobstructed movement of the public and commerce on the Nation's streets and highways. Daily these companies engage in the towing and recovery of virtually every type of motor vehicle that may be disabled, abandoned and/or illegally parked. This includes automobiles, buses, trucks of every weight and size, and heavy construction equipment.

In general, towing and recovery services consist of two types, "*private*" and "*public*." A private tow occurs when the owner of the vehicle contacts the towing company directly and arranges for the service. A public tow occurs when the service is arranged for by the applicable state or local government, even though the vehicle may be privately owned; *e.g.*, the towing of several personal vehicles involved in an accident. TRAA estimates that more than seventy-five percent of all towing and recovery companies perform public towing and recovery services for or on behalf of a state and/or local government, and that public towing generates somewhere between thirty and sixty percent of the revenues of these companies.

In virtually every instance in which public tows are provided by towing companies they are performed by the companies as independent contractors. The selection of a particular company to perform public towing and recovery services ordinarily results from either a state or local government's use of a sequential "rotation" or "call" list (as in the case now before the Court), the use of a competitive bid process, or both.

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can be towed or moved under its own power; for example, by righting an overturned tank truck, or by pulling a bus out of a ditch. Recovery operations typically require the use of specialized operator skills and equipment, including hydraulic booms and winches, cables, and dollies.

The purpose of using a rotation list is to provide the local or state law enforcement with an orderly process for distributing tows among towing companies. The list identifies the next-available company or companies to be contacted as the need for a specific towing and recovery service arises. While the specific criteria that are used for determining whether an individual company qualifies to be listed may vary among the various state and local governments, in general the criteria focus on the ability of individual companies to provide a safe and efficient service to the public. Typically, selection criteria will focus on towing and recovery skills and experience (*e.g.*, the skill and experience of a company to recover and tow an overturned tank truck laden with hazardous materials), the types of towing and recovery equipment a company has available, a company's financial responsibility, and if a company is going to be towing abandoned or illegally parked vehicles whether the company has secure facilities for storing vehicles. Qualifying companies for a public tow rotation list on the basis of performance-oriented criteria is especially essential since the vehicles to be towed and/or recovered are primarily privately-owned vehicles.

TRAA and its member companies have a vital interest in the issues and outcome of this case. The towing and recovery industry is the essence of small business. The typical company is family-owned and operates four vehicles. The cost of such vehicles requires a significant capital investment by such businesses. "Light-duty" vehicles used for towing and recovering automobiles and other small vehicles average $35,000 each, and have a useful life of no more than five years. The cost of a "heavy-duty" vehicle used for towing and recovering trucks, buses and other large vehicles ranges between

$175,000 and $225,000, depending on a vehicle's towing and lift capacity and the manner in which it is equipped, and have a useful life of no more than ten years. The owners of towing companies represent the hard-working dedication and independent spirit upon which this country was built. The issues presented here go to the heart and economic survival of this industry, as well as to the level of service and safety which the public has a right to expect whenever their privately-owned vehicles, or those of others, are subject to a public tow.

If the Court permits the decision below to stand, an immediate and generalized chilling effect on the exercise of free-speech and association by towing companies and other independent contractors nationwide will result. Indeed, affirmance of the decision below would further fuel the fires of an already fractious debate between the political parties, and the escalating disharmony and fragmentation and "get-evenness" that has been the result; that this would come at a time when all levels of government are looking increasingly to privatize their services by shifting work to independent contractors lends support for TRAA's concern.

STATEMENT OF THE CASE

Petitioners O'Hare Truck Service, Inc. (O'Hare) and its owner, John A. Gratzianna, brought this suit in the District Court following O'Hare's removal from the towing rotation list of Respondent City of Northlake. O'Hare had been on Northlake's rotation list and providing public towing services via the list since 1965. App. 22a, para. 10. Since at least 1965, it had been Northlake's policy and practice not to remove a company from the list unless there was cause, App. 22a, para. 8. In 1989, Respondent Paxson, Northlake's mayor, acknowledged the City's policy and advised Mr. Gratzianna that the policy would continue being applied as long as the quality of O'Hare's services was maintained. App. 22a, para. 10. Following his reelection in 1993, however, Mayor Paxson

directed Respondent Sapoznik, Northlake's police chief, to remove O'Hare from the City's rotation list. App. 23a, para. 14. O'Hare was removed from the list because Mr. Gratzianna refused to contribute to Mayor Paxson's reelection campaign and publicly supported his opponent. App. 23a, para. 12, 13.

Petitioners then filed this action in the District Court for the Northern District of Illinois, alleging that Respondents had violated Petitioners' First and Fourteenth Amendment rights of political association and due process, by ceasing to do business with O'Hare in retaliation for Mr. Gratzianna's refusal to support Mayor Paxson's campaign and his support for the Mayor's opponent during the election. Relying principally upon the Seventh Circuit's decision in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991), the District Court dismissed Petitioners' suit as a matter of law.

On appeal, the Seventh Circuit affirmed the District Court's dismissal, rejecting Petitioners' request that the court reconsider its *Downtown Auto Parks* decision in light of the principles enunciated in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) and other decisions of this Court. *O'Hare Truck Service, Inc. v. City of Northlake*, 47 F.3d 883 (7th Cir. 1995).

SUMMARY OF ARGUMENT

The removal of Petitioners from the Respondents' merit based towing rotation list, solely and in direct retaliation for Petitioners' support for an opposition candidate, was a denial of Petitioners' rights of political speech and assembly. That Petitioners were providing towing services to, and on behalf of, Respondents in the capacity of independent contractors rather than as government employees should not serve to deny them of such basic and fundamental Constitutional rights, or to justify the penalty imposed on Petitioners for having exercised those rights.

The categorical distinctions used by the Seventh Circuit to differentiate between independent contractors, as an unprotected class of citizens, and government employees, who are protected, are overly broad and ignore the applicable facts of this case, as well as the foreseeable and direct consequences of political retaliation to Petitioners and other independent contractors.

The administrative burdens which the Seventh Circuit perceives would be imposed on Respondents were *Elrod* extended in this case can not serve to justify denying Petitioners their First Amendment rights.

ARGUMENT

DENYING INDEPENDENT CONTRACTORS THEIR RIGHTS OF SPEECH AND POLITICAL ASSOCIATION HAS AS MUCH OF A CHILLING EFFECT ON THE FIRST AMENDMENT AS WHEN THOSE RIGHTS ARE DENIED TO GOVERNMENT EMPLOYEES

As the Court recognized in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972):

> For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Such interference with constitutional rights is impermissible.

"For the First Amendment right to 'speak one's mind . . . on all public institutions' includes the right to engage in

'vigorous advocacy' no less than 'abstract discussion.' " *Buckley v. Valeo*, 424 U.S. 1, 48 (1976), citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269, quoting *Bridges v. California*, 314 U.S. 252, 270 (1941), and *NAACP v. Button*, 371 U.S. 415, 429 (1963). These fundamental rights—linchpins of our democratic society—should not be permitted to end here or be further denied to a class of citizens no less deserving than those public employees for whom the scope of the First Amendment's protections has previously been recognized by this Court.

The issue TRAA wishes to address as *amicus* in this brief is what it perceives as fundamental problems in two of the three rationale cited by the Seventh Circuit in support "for [its] declining to extend *Elrod* [*v. Burns*, 427 U.S. 347 (1976) and its progeny] to independent contractors." *O'Hare*, 47 F.3d at 885. While underestimating the full extent to which patronage practices can and do restrain the rights of independent contractors, especially in the case of towing companies and many other small business entities, the Seventh Circuit also overstates the extent to which government would be adversely impacted if such rights were extended to towing companies and other independent contractors.

Citing to its earlier decisions in *Downtown Auto Parks, Inc.*, 938 F.2d 705 and *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), the Seventh Circuit's rejection of Petitioner's request for relief under the First Amendment is based upon three factors, two of which are relevant here: the "extent of the likely interference with an independent contractor's freedom to associate politically," *O'Hare*, 47 F.3d at 885, and the court's concern about "practical, administrative consequences of extending *Elrod's* protection," *id.*

A. The Broad Categorical Distinctions Applied By The Seventh Circuit To Deny Petitioners Relief Ignore The Applicable Facts In This Case As Well As The Foreseeable And Direct Consequences Of Political Retaliation To Petitioners And Other Independent Contractors.

In rejecting Petitioners' request for relief, the Seventh Circuit has summarily concluded that for any independent contractor, including Petitioners, "there [is] little chance that a contractor's freedom [is] impinged", *O'Hare*, 47 F.3d at 885, because of the government's threatened or actual denial of business in retaliation of a contractor's First Amendment exercise. The basis for this conclusion was discussed in detail in the Seventh Circuit's *LaFalce* decision, wherein the Seventh Circuit described its view of the marketplace in which independent contractors generally are perceived to operate:

> Although some business firms sell just to government, most government contractors do have private customers. If the contractor does not get the particular government contract on which he bids, because he is on the outs with the incumbent and the state does not have laws requiring the award of the contract to the low bidder (or the laws are not enforced), it is not the end of the world for him; there are other government entities to bid to, and private parties as well. *It is not like losing your job.* Of course, the contrast can be overstated; unless the government worker who loses his job cannot find another job anywhere, the loss will not be a total catastrophe. Nevertheless, many government workers could not find employment at the same wage in the private sector; and the prospect that a protracted period of search following discharge might well result in a substantially less well paid job would cause many government workers to flinch from taking ends adverse to their superiors. An independent contractor would tend *we imagine* to feel a somewhat lesser sense of dependency. [Emphasis added.]

712 F.2d at 294. The same rationale was applied by the Third Circuit in *Horn v. Kean*, 796 F.2d 668, 674-675 (3rd Cir. 1986).

While the foregoing analysis may accurately describe the situation for some independent contractors, it is far from the case for towing companies and many other independent contractors. First, unlike many industries serving both the public and private sectors, the demand for towing services is relatively inelastic and in any event largely out of the control of towing companies. The demand for towing services is precipitated by the occurrence of an accident or other disabling event not by the towing company. Thus there is little a towing company can do in the way of stimulating new demand for its services. Second, the vast majority of towing companies are highly dependent on local and state government for their business. Thus the loss of such business to individual companies can be devastating. More than seventy-five percent of all towing and recovery companies provide public towing and recovery services, and of these companies a significant portion of their gross revenues, TRAA estimates somewhere between thirty and sixty percent, are generated directly from services provided to or on behalf of government. In the instant case, a substantial part of the Petitioners' incomes are derived from fees resulting from public tows, App. 21a, para. 6. Thus, O'Hare's removal from Respondents' rotation list has caused Petitioners to lose substantial amounts of income, App. 23a, para. 15. Contrary to the Seventh Circuit's broad assumptions, however, O'Hare, like other typical towing companies, cannot easily replace lost government business, if at all, merely by looking to sell services to private customers. In effect, for a towing company to be barred or otherwise removed from a jurisdiction's rotation list solely in retaliation for the way in which one votes can be no different than losing one's job for the same reason. "Moreover, a discharged [government employee] can count on

unemployment benefits in the transition to a private sector job, while an independent contractor bears the entire risk of termination." *Horn v. Kean,* 796 F.2d at 681 n.1 (Gibbons, J. dissenting).

The Seventh Circuit's approach to the rights of independent contractors is arbitrary and simplistic, ascribing to independent contractors generally facts which may not apply. It is an approach which can easily lead to the same "inconsistent and unpredictable results" which Mr. Justice Scalia condemned in his dissent in *Rutan,* 497 U.S. at 110-113. For that reason, the Tenth Circuit in *Umbehr v. McClure,* 44 F.3d 876 (10th Cir. 1995) (the companion case, No. 94-1654, to *O'Hare*), has "reject[ed] any categorical distinctions based on whether independent contractors have more or less of an economic interest in their government contracts, both because such categorical distinctions are impossible to make and because, in this context, they are irrelevant." *Umbehr,* 44 F.3d at 883. As the Tenth Circuit correctly reasons:

> There is little justification for a rule that the magnitude of the loss determines whether an individual's First Amendment rights have been violated. As the dissenting opinion in *Horn* pointed out, "The [sic] constitutional wrong condemned in *Elrod* and *Branti* [*v. Finkel,* 445 U.S. 507 (1980)] was the state's attempt to control the beliefs and associations of its citizens. That control can be just as effective and offensive when the state reduces a citizen's income by twenty percent as when the state reduces the citizen's income by one hundred percent."

The Third Circuit's majority opinion in *Horn* (holding that the replacement of independent contractors following the election of the opposition party's gubernatorial candidate did not infringe First Amendment rights) is further persuasive in this regard. While following the Seventh Circuit's *LaFalce* rationale, the Third Circuit expressly noted that:

> In the case at bar, we are deciding only the matters before us. Thus, we do not meet the emotionally-charged scenario posed at oral argument: Whether the first amendment [sic] would protect from politically-motivated discharge an independent contractor with substantial economic dependence on the state, *e.g.,* a one-person shoe-shine in a public building.

Horn, 796 F.2d at 675 n.9.

In short, "[r]ights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Elrod,* 427 U.S. at 359 n.13. To sanction the Seventh Circuit's decision will serve to deny significant numbers of towing companies, as well as many other independent contractors, from freely exercising the most basic of rights guaranteed under the First Amendment—the rights of political association and political expression. Fearing retaliation should they support the wrong candidate, substantial numbers of companies would be forced either to forego voting or to vote for candidates they would otherwise not support, solely in order to maintain their economic viability. That towing companies are as dependent on public towing as they are makes this outcome a certainty.

B. The Harm Which The Seventh Circuit Perceives Will Occur To Government By Extending *Elrod* In This Case Does Not Justify Denying Petitioners Their First Amendment Rights.

In "declining to extend *Elrod* to independent contractors", *O'Hare,* 47 F.3d at 885, the Seventh Circuit expressed particular concern "that a decision upholding a First Amendment right to have one's *bid* considered without regard to political considerations would invite every disappointed *bidder* for a public contract to bring a federal suit against a government purchaser", *id.* (emphasis supplied).

In the case at bar, Petitioner O'Hare was not a "bidder for a public contract" but rather a job incumbent listed on, and providing public towing services from, the Respondent's rotation list; a list which, until Respondent Paxon's reelection in 1993, had long been recognized and understood as being a "merit based" apolitical list both by the Respondent City and by all of the companies on the list. O'Hare had been on Northlake's towing rotation list and providing public towing services through the list since 1965, App. 22a, para. 10; since at least 1965, it had been Northlake's policy and practice not to remove a company from the list unless there was cause, App. 22a, para. 8.

The historical application of Respondent's rotation list, as well as its fundamental purpose, TRAA would submit, was consistent with the two-fold purpose and manner in which rotation lists are used by communities throughout the country: (i) compiling a merit-based list of the towing companies available in that community, based solely on performance-oriented (as opposed to political) criteria; and (ii) providing an orderly system for distributing tows among the companies that have been listed. Although *Elrod's* extension in this case could potentially result in some additional litigation to the City, TRAA submits that this reason alone should not be elevated above fundamental rights which the First Amendment was designed to protect.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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